

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

DUANE SCHULTZ,

Debtor.

CASE NUMBER 03-40766

ROBERT H. KIRKPATRICK, JR.,  
*et al.*,

Plaintiffs,

vs.

DUANE SCHULTZ,

Defendant.

ADVERSARY NUMBER 03-4141

M E M O R A N D U M      O P I N I O N

This matter came before the Court on the motion for summary judgment (the "Motion") filed by Plaintiffs Robert H. Kirkpatrick, Jr. and Lori A. Kirkpatrick ("Plaintiffs"). Debtor/Defendant Duane Schultz ("Defendant") failed to reply to the Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

## S T A N D A R D   O F   R E V I E W

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056. Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational factfinder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *Structurlite Plastics Corp. v. Griffith (In re Griffith)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson*

*v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Liberty Lobby*, 477 U.S. at 257)). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

## **D I S C U S S I O N**

### **Facts**

On June 30, 2003, Plaintiffs filed an amended complaint (the "Complaint") asserting that the debt Defendant owes to Plaintiffs is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Defendant operates an unincorporated business, Exterior Remodelers and First Response Homebuilders and Remodelers, that performs home improvement, remodeling and new construction. Defendant and Plaintiffs entered into a contractual agreement (the "Agreement") whereby

Defendant was to construct a pole barn and Plaintiffs were to make installment payments totaling Twenty Thousand Six Hundred Dollars (\$20,600.00) to Defendant for erecting the pole barn. The contract price was intended to encompass the cost of materials, labor and all incidental expenses related to the pole barn's construction.

Plaintiffs paid Defendant Fifteen Thousand Four Hundred Fifty Dollars (\$15,450.00) pursuant to the terms of the Agreement. At some point after receiving this money, Defendant ceased working and failed to complete construction of the pole barn. Accordingly, Plaintiffs hired another contractor to complete construction. Plaintiffs paid Thirty-One Thousand Two Hundred Seventy-Two and 78/100 Dollars (\$31,272.78) in total for the completed pole barn, comprised of the payments made to Defendant under the terms of the Agreement that was never completed and the payments made to the contractor who completed the pole barn. On November 29, 2002, Plaintiffs were awarded a default judgment in the Court of Common Pleas, Medina County, Ohio, Case Number 02 CIV 1163, in the amount of Thirty-Three Thousand Eight Hundred Eighteen and 34/100 Dollars (\$33,818.34) in compensatory damages and One Thousand Eight Hundred Dollars (\$1,800.00) in attorney fees.

In Plaintiffs' Motion, they assert Defendant failed to perform pursuant to the terms of the Agreement, alleging: (1) Defendant failed to complete construction, (2) Defendant performed in a negligent and unworkmanlike manner; (3) Defendant unilaterally and without notice ceased to perform work; (4) Defendant supplied insuf-

ficient funds to the suppliers and (5) Defendant was unjustly enriched by Fifteen Thousand Four Hundred Fifty Dollars (\$15,450.00) because he was paid for work which he failed to perform. In sum, although the action is based upon Defendant's failure to complete a contract, Plaintiffs appear to rely on tort concepts in asserting that Defendant breached his duty to them by negligently performing work on the pole barn, thereby injuring Plaintiffs. In addition, Plaintiffs assert that Defendant engaged in unfair, deceptive and unconscionable acts and practices determined to be in violation of Ohio Revised Code §§ 1345.02 and 1345.03, and allege that Defendant's conduct was intentional.

#### **Legal Analysis**

A motion for summary judgment is appropriate if (1) there is no genuine issue of material fact and (2) if the moving party is entitled to judgment as a matter of law. Defendant never responded to Plaintiffs' Complaint or to Plaintiffs' Motion. Plaintiffs provided the Court with a copy of: (1) the Agreement; (2) the default judgment; (3) the checks paid to Defendant; (4) an itemized list of the costs expended to complete the pole barn and (5) an affidavit of Plaintiff Lori A. Kirkpatrick. Based on the record provided, no material facts are in dispute. However, Plaintiffs' facts fail to establish entitlement to the relief requested. Based on the record Plaintiffs provided, they are not entitled to judgment as a matter of law.

Plaintiffs assert they are entitled to summary judgment.

ment pursuant to § 523(a)(2)(A) of the Bankruptcy Code. Section 523(a)(2)(A) provides that a Chapter 7 discharge

does not discharge an individual debtor from any debt --

. . .

(2) for money, property, services or an extension, renewal, or refinancing of credit, to the extent obtained, by --

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

11 U.S.C. § 523(a)(2)(A). Plaintiffs do not provide any specific facts regarding false pretenses, a false representation or actual fraud performed by Defendant in relation to construction of the pole barn. Rather, Plaintiffs primarily assert conclusory statements. For example, Plaintiffs assert, "Defendant engaged in unfair, deceptive and unconscionable acts and practices in violation of O.R.C. 1345.02 and 1345.03. Plaintiffs believe the conduct of Defendant was intentional." (Pls.' Mot., 3.) However, Plaintiffs fail to provide **ANY** facts supporting this conclusory statement. Based on the record Plaintiffs have provided, Plaintiffs fail to establish that the debt was based on false pretenses, a false representation or actual fraud and, thus, constitutes an exception to discharge.

#### C O N C L U S I O N

The motion for summary judgment filed by Plaintiffs is hereby denied.

An appropriate order shall entered.

HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

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O R D E R

For the reasons set forth in this Court's memorandum opinion entered this date, the motion for summary judgment filed by Plaintiffs Robert H. Kirkpatrick, Jr. and Lori A. Kirkpatrick is denied.

IT IS SO ORDERED.

HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this \_\_\_\_\_ day of January, 2005, addressed to:

ROBERT H., JR. and LORI A. KIRKPATRICK,  
2245 Hickory Creek Drive, Medina, OH 44256.

RONALD M. MARTIN, ESQ., 1615 Akron Peninsula  
Road, Akron, OH 44313.

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810 Wick Building, Youngstown, OH 44503.

SAUL EISEN, United States Trustee, BP America  
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3300, Cleveland, OH 44114.

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JOANNA M. ARMSTRONG